(4)

No. 90-139

In The

# Supreme Court of the United States

October Term, 1990

THE STATE OF TEXAS,

*Petitioner,*

v.

JOHN SKELTON,

*Respondent.*

## REPLY BRIEF IN SUPPORT FOR PETITION OF WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

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## QUESTION PRESENTED

I. WHETHER THE TEXAS COURT OF CRIMINAL APPEALS HAS MISAPPLIED THE RULE OF JACKSON V. VIRGINIA 443 U.S. 307 (1979) BY HOLDING THAT THE PROSECUTION IS UNDER AN AFFIRMATIVE DUTY TO DISPROVE EVERY HYPOTHESIS EXCEPT THAT OF GUILT BEYOND A REASONABLE DOUBT.

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No. 90-139

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## REPLY BRIEF IN SUPPORT FOR PETITION OF WRIT OF CERTIORARI TO THE TEXAS COURT OF CRIMINAL APPEALS

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

NOW COMES THE STATE OF TEXAS, Petitioner herein, by and through the District Attorney of Ector County, Mr. Gary P. Garrison, and files this Reply Brief in Support of Petition for Writ of Certiorari to the Texas Court of Criminal Appeals pursuant to Rule 15.6 of the Supreme Court Rules.

### REASONS FOR GRANTING THE WRIT

### 1. JURISDICTION IS PROPER IN THIS COURT.

Respondent avers that this Court does not have jurisdiction over this cause because the facts and procedural

standing of the case are not within the purview of 28 U.S.C. Section 1257(a). Here reliance is misplaced.

Petitioner has always maintained that this Court has jurisdiction pursuant to the "plain statement doctrine." As discussed in the original petition for writ of certiorari filed in this cause there are no independent state grounds and the decision of the Texas Court of Criminal Appeals appears to rest primarily on Federal grounds or to be interwoven with Federal grounds. These facts are sufficient to trigger the Court's Jurisdiction under 28 U.S.C. 1257(a). *Montana v. Hall,* 481 U.S. 400 (1987) f.n. 3. This Court has jurisdiction over the cause.

## 2. THE QUESTION PRESENTED IN PETITIONER PETITION FOR WRIT OF CERTIORARI HAS BEEN PROPERLY PRESENTED.

Respondent alleges in his amended Brief in Opposition that because the question presented was not specifically addressed in the Appellee's Brief in the Court of Criminal Appeals that the issue was "bypassed". Here reliance is misplaced.

As noted by Respondent the issue was formally raised in the States' Motion for Rehearing before the Texas Court of Criminal Appeals. The fact that the question presented was not raised in precise terms in the original briefs before the Texas Court of Criminal Appeals is not a bar to Jurisdiction.

It has long been the rule that this jurisdictional requirement is satisfied only if the record shows that the Federal question has been presented for decision to the highest court of the state or has in fact been decided by it, and that its decision was necessary to the judgement. *Wilson v. Cook,* 327 U.S. 472, 794 (1946); *Nickey v. Mississippi,* 292 U.S. 393, 394 (1934). In the instant case, it is

readily apparent that the issue has been decided by the Texas Court of Criminal Appeals. The Court invoked the standard of *Jackson v. Virginia*, 443 U.S. 307 (1979) and misapplied that standard knowing that the vitality of the "exclusion of outstanding reasonable hypothesis test" was in doubt. This contention is illustrated by Respondent's own words. "Under *Jackson v. State*, 672 S.W. 2d 801, 803 (Tex. Crim. App. 1984), the standard of review is that set forth in *Jackson v. Virginia*, 443 U.S. 307 (1979). *In applying that test, this Court has agreed that the 'exclusion of outstanding reasonable hypotheses' test is still applicable.*" (Respondent's brief before the Texas Court of Criminal Appeals at page 23) (Emphasis ours). The issue was clearly before the court, was decided by the court, and necessary to the determination of the judgment.

Further, Petitioner contends that it should be entitled to rely on the proper Constitutional standard in a court's deliberation. The Texas Court of Criminal Appeals misapplied the standard enumerated in *Jackson*, supra, and the State responded as soon as practicable.

### 3. PETITIONER'S MOTION FOR REHEARING ADEQUATELY ADDRESSED THE INSTANT CONSTITUTIONAL ISSUE AND THE QUESTION PRESENTED.

Respondent's contention is without merit. A review of Petitioner's point of error five in the motion for rehearing before the Texas Court of Criminal Appeals illustrates that the very heart of the question presented was briefed and presented. The two opinions relied on in this Honorable Court were cited and argued in that point of error. The Petitioner specifically set out the Constitutional error. *McWherter v. State*, 607 S.W. 2d 531 (Tex. Crim. App. 1980)

and *McCambridge v. State*, 712 S.W. 2d 499 (Tex. Crim. App. 1986) are inapposite.

## 4. ARGUING ALTERNATIVE THEORIES OR POINTS OF LAW DOES NOT ESTOP PETITIONER FROM PRESENTING THE QUESTION PRESENTED.

Here Respondent confuses advocacy with a form of factual estoppel. The reticence of the Texas Court of Criminal Appeals to allow a review of its decisions by other tribunals is notorious. *White v. State*, 543 S.W. 2d 366 (Tex. Crim. App. 1976) (holding that a writ of certiorari to the Texas Court of Criminal Appeals by the state is legally impossible). With the foregoing in mind logic and advocacy dictate that Petitioner's first attack should be on the state rule.

Petitioner's first point of error addressed the fact that the rule had been utilized in Texas for a long period of time. In the final point of error Petitioner pointed out the Constitutional infirmities of the rule. There is no prohibition against attacking a rule of law on both State and Federal grounds.

Reliance on *Stegald v. United States*, 451 U.S. 204 (1981) is misplaced. The holding there concerns the government acquiescence in a factual finding by the court below, not an attack based on both state and federal law. The argument was proper and there is no estoppel.

## 5. THE QUESTION PRESENTED IS PRESERVED.

Even a cursory reading of motion for rehearing shows that the Petitioner objected to the use of the "exclusion of the reasonable hypothesis rule."

> "Without waiving the foregoing the State respectfully urges that the Court has misapplied the teaching of *Jackson*, supra, by embracing the

> 'exclusion of reasonable hypothesis rule' whether as rule of law or analytical construct. It is the holding of the United States Supreme Court that the rule has no application under the *Jackson* standard. Rather than adopt the standard espoused by the Supreme Court's opinion the Court has applied this rule in, as Justice McCormick notes in Butler, *supra* at 244, in a 'disturbingly selective' fashion. There should be but one standard in circumstantial evidence cases and the analysis used should not depend upon the type or severity of the offense."

Respondent's complaint that the Petitioner did not state its Constitutional objection to the use of the test in *any manner* is without merit. The fifth point of error clearly states that the rule has *no application* under *Jackson*, supra. The question presented is preserved.

## 6. THE OPINION OF THE TEXAS COURT OF CRIMINAL APPEALS WAS NOT BASED ON AN ADEQUATE AND INDEPENDENT STATE LAW BASIS.

Respondent mischaracterizes the holding of *Michigan v. Long*, 463 U.S. 1032, 1040-1041 (1983) by confusing history with the "plain statement" doctrine. In *Long* this Court held,

> "It is precisely because of this respect for state courts, and this desire to avoid advisory opinions, that we do not wish to continue to decide issues of state law that go beyond the opinion that we review, or to require state courts to reconsider cases to clarify the grounds of their decisions. Accordingly, when, as in this case, a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the Federal law, and when the adequacy and independence of any possible state law ground is not clear from the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did

> because it believed that federal law required it to do so. If a state court chooses merely to rely on federal precedents as it would on the precedents of all other jurisdictions, then it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance, and do not themselves compel the result that the court has reached."

In the instant case, the Texas Court of Criminal Appeals was "constrained" to follow *Jackson* (Appendix A-8, Petition for Writ of Certiorari to the Texas Court of Criminal Appeals). The Texas Court of Criminal Appeals opinion was based primarily on Federal law and is interwoven with Federal law. The fact that the "exclusion of reasonable hypothesis test" is well settled in Texas Jurisprudence and has been extant for one hundred years in no way diminishes the fact that the Court of Criminal Appeals acknowledged that the *Jackson* standard is the controlling rule of law in sufficiency of evidence cases and that the Court felt "constrained" to follow it.

An adequate and independent state law basis is not apparent from the face of the opinion.

## 7. GRANTING THE PETITION FOR WRIT OF CERTIORARI WOULD NOT VIOLATE RESPONDENT'S RIGHTS AGAINST DOUBLE JEOPARDY.

## 8. THE JUDGEMENT OF ACQUITTAL WAS NOT PROPERLY ENTERED.

Prior to 1979, the test for an appellate determination of the sufficiency of the evidence was whether, viewed in the light most favorable to the verdict, there was *any* evidence which, if believed, showed the guilt of the accused. This rule applied in both Federal and Texas Jurisprudence. *Thompson v. Louisville,* 362 U.S. 199 (1960); *Banks v. State,* 510 S.W. 2d 592 (Tex. Crim. App. 1974).

This standard was commonly referred to as the "no evidence" standard.

Until 1978, a reversal for insufficiency of evidence in Texas (under the "no evidence" standard) did not warrant acquittal. Cases were remanded for retrial. *Phillips v. State*, 297 S.W. 2d 134 (Tex. Crim. App. 1957). Pursuant to this Court's decision in *Burks v. United States*, 437 U.S. 1 (1978) the Texas Court of Criminal Appeals entered judgement of acquittals where there was "*no evidence*" to support the conviction. *Roberts v. State*, 571 S.W. 2d 10 (Tex. Crim. App. 1978). *Kunde v. State*, 3 S.W. 2d 325, 332 (Tex. Ct. App. 1886).

Thus, prior to 1978, an appellate finding that there was an "outstanding reasonable hypothesis other than guilt" did not mandate an entry of an order of acquittal.

In 1979, this court's decision in *Jackson*, supra brought the demise of the "no evidence" standard in favor of the now well known standard, viewing the evidence in a light most favorable to the verdict could a rational trier of fact have found every element of the offense beyond a reasonable doubt. In *Jackson*, this Court rejected the motion that the state was under an affirmative duty to rebut all reasonable hypothesis except the guilt of the defendant, and that circumstantial cases required a higher or different burden of proof. The Court further held that a Court faced with conflicting inferences must presume that the trier of fact resolved these conflicts in favor of the state.

Respondent contends that the omission of the word "reasonable" before the word "hypothesis" means that this Court still requires the state to exclude all *reasonable* hypothesis is not well taken. "The evidence need not exclude every *reasonable* hypothesis except that of guilt. *Tibbs v. Florida*, 475 U.S. 31, 38 (1982) at f.n. 11.

From the foregoing it is apparent that neither this Court nor the Constitution of the United States requires acquittal merely because there is an appellate finding of an outstanding reasonable hypothesis other than the guilt of the defendant.

In the instant case, the Texas Court of Criminal Appeals expressed its displeasure at having to reverse "the conviction in this heinous case and ordering an acquittal . . . " because the evidence did not exclude every other reasonable hypothesis, and stated that they were compelled to do so under the rule of *Burks*, supra.

The Texas Court of Criminal Appeals having invoked *Jackson*, supra, and *Burks*, supra, erred by holding that these opinions mandated acquittal. Arguendo sufficient evidence of Respondent's guilt was presented with the exception of an outstanding reasonable hypothesis no Constitutional Jeopardy question was reached.

## 9. APPLYING THE EXCLUSION OF OUTSTANDING REASONABLE HYPOTHESIS TEST IS A CONSTITUTIONAL VIOLATION.

The rule of *Jackson* is the Constitutional standard for evidentiary review. To misapply this Court's holding in reviewing a cause is a violation of *Jackson* and the pronouncements of this Court, the arbiter of the Constitution. Petitioner respectfully urges it has the right to rely and follow the Court's ruling, *Long*, supra.

## 10. THE SAME ISSUE PRESENTED IN THE PETITIONER'S PETITION FOR WRIT OF CERTIORARI IS NOW BEFORE THE TEXAS COURT OF CRIMINAL APPEALS.

Pursuant to Rule 15.7 of the Supreme Court Rules the Petitioner wishes to respectfully bring to the Court's attention to *State of Texas v. Geesa*, No. 0290-90 (1990).

In *Geesa* the Ft. Worth Court of Appeals reversed the jury verdict of a Texas trial Court and ordered an acquittal on the basis of insufficient proof (Appendix A-1). The offense alleged was the Unauthorized Use of a Motor Vehicle. The Ft. Worth Court of Appeals found that there was insufficient evidence that the Appellant operated the Motor Vehicle.

The Texas Court of Criminal Appeals has granted the States Petition for Discretionary Review to review the following issues:

1. Whether there was sufficient circumstantial evidence that Appellant operated the vehicle in question.

2. Whether *Jackson v. Virginia*, 443 U.S. 307 (1979), requires that the prosecution's proof, when reviewed on appeal, exclude every reasonable hypothesis of innocence.

3. Whether the Court should overrule language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and other previous decisions, holding that the reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" for applying the sufficiency of evidence test enunciated in *Jackson v. Virginia*.

The order granting review is attached as Appendix B-1. The Brief on the Merits for the State of Texas to the Texas Court of Criminal Appeals is attached as Appendix C-1.

The petitioner herein respectfully urges that the outcome of *Geesa* is material to the adjudication of the instant cause. In the event that the Texas Court of Criminal Appeals recognizes its error in misapplying the *Jackson* standard of review the State prays that the instant cause be remanded with instructions to the Texas Court of Criminal Appeals for consideration under the proper standard of review. In the event that the Texas Court of

Criminal Appeals persists in its erroneous misapplication of *Jackson*, the State prays that its Petition for Writ of Certiorari to the Texas Court of Criminal Appeals be granted and this Honorable Court intervene to prevent the repetition of error.

Petitioner further requests that this Honorable Court maintain Jurisdiction over the instant cause pending resolution of *Geesa*.

## CONCLUSION

For these reasons the petitioner prays that the Court maintain Jurisdiction over the instant cause to prevent the repetition of error and that the Petition for Writ of Certiorari to the Texas Court of Criminal Appeals be granted.

Respectfully submitted,

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**APPENDIX A**

NO 2-88-140-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

| | | |
|---|---|---|
| Douglas Alan Geesa | ) | From the Criminal |
| vs. | ) | District Court |
| | ) | No. 2 of Tarrant |
| The State of Texas | ) | County (0313898R) |
| | ) | February 21, 1990 |
| | ) | Opinion by Justice Farris |
| | ) | (NFP) |

JUDGMENT

This Court has considered the record on appeal in this cause and is of the opinion that there was error in the judgment of the trial court.

It is the order of this Court that the judgment of the trial court be reversed and remanded with instructions to enter a judgment of acquittal and that this decision be certified below for observance.

/s/ DFF

REVACO CRmj

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NO. 2-88-140-CR

COURT OF APPEALS

SECOND COURT OF APPEALS DISTRICT OF TEXAS

FORT WORTH

DOUGLAS ALAN GEESA

APPELLANT

VS.

THE STATE OF TEXAS

STATE

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FROM CRIMINAL DISTRICT COURT
NO. 2 OF TARRANT COUNTY

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OPINION

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Douglas Alan Geesa, appellant, was convicted by a jury of unauthorized use of a motor vehicle, *see* TEX. PENAL CODE ANN. sec. 31.07(a) (Vernon 1989), and sentenced to forty years confinement in the Texas Department of Corrections. We sustain his complaint on appeal that the evidence was insufficient to support his conviction, reverse the judgment of the trial court, and remand the case to the trial court with an instruction to enter a judgment of acquittal.

In considering Geesa's insufficient evidence points, we must review the entire body of evidence to determine whether the State has proved every element of the alleged crime beyond a reasonable doubt. *See Butler v.*

*State*, 769 S.W.2d 234, 239 (Tex.Crim.App. 1989). An essential element of the offense is that Geesa operated the motor vehicle. *See Jackson v. State*, 645 S.W.2d 303, 305-06 (Tex.Crim.App. 1983). After reviewing all of the evidence in the light most favorable to the State, we hold that the evidence that Geesa operated the motor vehicle is insufficient to sustain his conviction.

The State introduced the evidence of three witnesses to establish the identity of the unauthorized driver of the motor vehicle, a pickup. The witnesses were: Guy Baird, whose attention was drawn to the pickup by its unexplained and suspicious appearance at a closed Texaco service station; Leroy Pierce, the arresting officer; and Stewart Mark Brozgold, a Crime Scene Investigator for the Arlington Police Department. Officer Pierce testified that he responded to a radio dispatch by driving to the Texaco service station where he saw Geesa standing in the company of another Arlington police officer. Officer Pierce observed the pickup engine was hot, as if it had just been driven, and that Geesa matched the radio-dispatched description of the driver he was given, that of a white male wearing a white tee shirt and cream-colored pants. The description apparently was given by Baird, who called the Arlington Police Department when he became concerned with the pickup's presence at the Texaco service station located approximately 150 ft. from his place of employment at 3:30 a.m. Baird did not recall giving the police dispatcher a description of the driver. He testified that it was dark and he was unable to identify Geesa as either of the pickup's two occupants.

Brozgold testified he found several packages of cigarettes on the left side of the dash above the steering

wheel and he was able to identify fingerprints found on the cigarette packages as Geesa's. According to Pierce, Geesa denied any knowledge of the pickup truck, claiming that he had walked to the station and was there to collect discarded items, although the items found on his person had apparently been stolen from the Texaco service station. Although the police dispatcher reported two suspects were involved, only Geesa was apprehended.

Although it is clear from the evidence that Geesa was in some way involved with the presence of the pickup at the Texaco service station, and it appears he might very well have been charged with burglary or theft, we hold the evidence is insufficient to prove the essential element of operation of a motor vehicle. Geesa is incriminated by his statements to the officer, which are inconsistent with the cigarette packages found in the interior of the truck. However, his conduct and the fact that the cigarettes were found inside the pickup, although certain proof of his involvement with the truck, create only a strong suspicion or mere probability of his guilt of the offense charged and such will not support his conviction on appeal. *See Avina v. State*, 751 S.W.2d 318, 320 (Tex.App. - Fort Worth 1988, pet. ref'd).

The State urges that the similarity between the manner in which Geesa was clothed at the time of his arrest and the description of the driver's clothing contained in the police dispatch is sufficient when coupled with the other evidence to identify Geesa as the driver, relying on the Court of Criminal Appeals opinion in *Bonner v. State*, 640 S.W.2d 601, 603 (Tex.Crim.App. [Panel Op.] 1982). The facts of *Bonner* are easily distinguishable from the

present case. *Bonner* was convicted of burglary of a vehicle following his arrest by a security guard at an automobile dealership. The security guard first observed Bonner at a distance of 6 to 12 ft., and although he was unable to see Bonner's face, he "observed carefully what the man was wearing." *Id.* at 602. Minutes later he arrested Bonner and at trial testified that Bonner "was dressed identically to the person he had earlier observed. . . . " When first observed, Bonner appeared to be jacking up a pickup truck from which, the witness later discovered, the front and right rear tires and the spare tire had been removed. In contrast, Pierce had only testified that Geesa's attire matched the description given by the dispatcher as to the white tee shirt and the cream-colored pants.

Because we find that a rational trier of fact could not have excluded every reasonable hypothesis except Geesa's guilt, we reverse the trial court's judgment and remand the case to the trial court with instructions to enter a judgment of acquittal. *See Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *also Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978).

/s/ David F. Farris
David F. Farris,
Justice

PANEL B
FARRIS, LATTIMORE, AND MEYERS, JJ.
DO NOT PUBLISH
TEX. R. APP. P. 90(e)
FEB 21 1990

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

May 23, 1990

RE: Case No. 0290-90
STYLE: Geesa, Douglas Alan

JUSTICE COA: 02-88-00148-CR

MAY 23'90

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On this day, the State's Petition for Discretionary Review has been GRANTED. Oral argument, if desired, must be requested BY LETTER WITHIN 30 DAYS. An original and ten copies of the State's Brief must be filed with this Court within 30 days. The Appellant's brief is due 30 days after the timely filing of the State's brief.

ENTERED MAY 25 1990

Thomas Lowe, Clerk

COURT OF CRIMINAL APPEALS
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**APPENDIX C**

| | | |
|---|---|---|
| DOUGLAS ALAN GEESA,<br>APPELLANT | § | |
| V. | § | NO. 0290-90. |
| THE STATE OF TEXAS,<br>APPELLEE | § | |

ON STATE'S PETITION FOR DISCRETIONARY REVIEW OF CAUSE NUMBER 02-88-0140-CR IN THE COURT OF APPEALS FOR THE SECOND APPELLATE DISTRICT OF TEXAS, FORT WORTH, TEXAS, REVERSING THE CONVICTION IN CAUSE NUMBER 0313898R IN THE CRIMINAL DISTRICT COURT NUMBER TWO OF TARRANT COUNTY, TEXAS; THE HONORABLE L. CLIFFORD DAVIS, JUDGE PRESIDING.

§ § §

STATE'S BRIEF ON THE MERITS

§ § §

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## NAMES OF ALL PARTIES

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The State of Texas

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| THE STATE OF TEXAS,<br>APPELLEE | §<br>§ | |

STATE'S BRIEF ON THE MERITS

TO THE COURT OF CRIMINAL APPEALS OF TEXAS:

## STATEMENT OF THE CASE

A jury convicted Appellant of unauthorized use of a vehicle and, after finding that he had two previous felony convictions, set his punishment at confinement for 40 years. The Fort Worth Court of Appeals, in an opinion by Justice David Farris, reversed and ordered an acquittal on the basis of insufficient proof that Appellant operated the vehicle. *Geesa v. State*, #2-88-140-CR (Tex. App. ___ Fort Worth; Feb. 21, 1990)(unpublished).

## QUESTIONS FOR REVIEW

1. Whether there was sufficient circumstantial evidence that Appellant operated the vehicle in question.

2. Whether *Jackson v. Virginia*, 443 U.S. 307 (1979), requires that the prosecution's proof, when reviewed on appeal, exclude every reasonable hypothesis of innocence.

3. Whether the Court should overrule language in *Butler v. State*, 769 S.W.2d 234 (Tex. Crim. App. 1989), and other previous decisions, holding that reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" for applying the sufficiency test enunciated in *Jackson v. Virginia*.

## FACTUAL SUMMARY

Store clerk Guy Baird's suspicions were aroused when a light-colored pickup pulled into the driveway of a closed Texaco service station around 3:00 a.m. From his vantage point across the street, Mr. Baird saw the pickup stay parked for about 10 or 15 minutes and then back toward the service bays. He saw the two occupants of the pickup move about in front of the station. One was wearing dark-colored clothing and the other light-colored clothing. Mr. Baird called the police and described what he "saw out there," but he could not remember what he told the police dispatcher concerning the driver's description.[1] R. V – 35-38, 42.

When Officer Leroy Pierce arrived at the Texaco station following a radio dispatch, he found that another officer had already responded and was standing with Appellant. R. V – 48-49. Appellant told Officer Pierce that he had never seen the truck before and that he was picking up discarded items from the station. R. V – 57.

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[1] The opinion of the Court of Appeals recites that Mr. Baird "did not recall giving the police dispatcher a description." Slip opin., p.3. Baird said only that he could not remember exactly what he said. R. V – 38.

The pickup engine was hot, there were 10 full quarts of Texaco oil in the bed of the pickup, and Appellant was carrying a quart of Texaco oil and a quart of Texaco transmission fluid. R. V – 49-50, 57. The service station's display rack had been stripped of its oil. R. V – 51.

A second radio transmission advised Officer Pierce that the caller (obviously Mr. Baird) said the driver wore a white T-shirt and cream-colored pants. R. V – 54. That is what Appellant had on. R. V – 54.

Appellant's fingerprints were on three packages of cigarettes found in the pickup on the left side of the dash above the steering wheel. R. V – 94-96.

The pickup had been stolen some 3½ weeks earlier; Appellant had no permission to use it. R. V – 17, 19, 21, 50. The other occupant of the pickup was never apprehended. R. V – 53.

## TERMINOLOGY

Part of the accepted procedure in sufficiency analysis is to view the evidence "in the light most favorable to the verdict." In this brief we will often describe that favorable view of the evidence as "the State's evidence." We recognize, however, that such evidence may have originated with a defense witness.

We also use "trier of fact" and "jury" interchangeably, though the trial judge will of course be the trier of fact in some cases.

## SUMMARY OF THE ARGUMENT

On review of the sufficiency of the evidence to support a criminal conviction, the question is " . . . whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979).

Although this Court has repeatedly acknowledged that *Jackson v. Virginia* contains the ultimate test for the sufficiency of the evidence, the Court also maintains that reasonable-hypothesis-of-innocence analysis is a proper "analytical construct" to facilitate the application of the *Jackson* test where the conviction is based on circumstantial evidence. In other words, if the appellate court determines that circumstantial evidence, when viewed in the light most favorable to the State, contains a reasonable explanation inconsistent with guilt, the evidence is insufficient and the defendant is entitled to an acquittal. *E.g.*, *Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983); *Butler v. State*, 769 S.W.2d 234, 238 n.1 (Tex. Crim. App. 1989).

The Court's use of the analytical construct is wrong.

First, reasonable-hypothesis analysis conflicts directly with the command of *Jackson v. Virginia*, and labeling that analysis a "construct" does not make the conflict disappear. *Jackson v. Virginia* asks only whether *any* rational fact-finder could have concluded that the defendant was *guilty* beyond a reasonable doubt. When this Court asks itself whether the evidence, even viewed

in the light most favorable to the State, discloses a reasonable hypothesis inconsistent with guilt, it is asking whether any trier of fact could have rationally found the defendant *innocent*. Stated another way, the construct asks whether *every* rational trier of fact would have been compelled to convict under the evidence viewed most favorably to the State, while *Jackson* asks only whether *any* trier could have rationally convicted. In short, the construct turns the *Jackson* test on its head.

Second, and this reason is intertwined with the first, the construct distorts the constitutional meaning of proof beyond a reasonable doubt and fails to respect the division of labor between trier of fact and reviewing court. The only proper question is whether *the trier of fact* could have been rationally convinced that the defendant was guilty beyond a reasonable doubt. That a different jury or a majority of an appellate court might have acquitted even under the most favorable view of the State's evidence does not mean there was a failure of proof in the constitutional sense. *See Johnson v. Louisiana*, 406 U.S. 356, 362-63, 92 S.Ct. 1620, 1624-25, 32 L.Ed.2d 152 (1972). If an appellate court must order an acquittal because it perceives a reasonable hypothesis of innocence, even when there is also a reasonable hypothesis of guilt, the court inevitably assumes the role of a 13th and deciding juror. *Cf. Blankenship v. State*, 780 S.W.2d 198 (Tex. Crim. App. 1989). Whether there is a reasonable hypothesis of innocence is solely a question for the jury. The only constitutional role of the reviewing court is to decide whether there is rational support for the guilty verdict.

Third, reliance on the construct continues to imply that circumstantial and direct evidence are inherently

different and that the former is less trustworthy. This distinction between direct and circumstantial evidence has been rejected by the Court in all other contexts, and there is no reason to retain it in one area. *See generally, Hankins v. State*, 646 S.W.2d 191 (Tex. Crim. App. 1983).

Finally, the decided trend among the states is to reject the reasonable-hypothesis construct as an appellate test, and all federal lower federal courts have rejected it. Moreover, this Court's own decisions in analogous areas support abandonment of the construct.

## ARGUMENT AND AUTHORITIES

### I. THE FEDERAL CONSTITUTIONAL BACKGROUND

The Due Process Clause of the Fourteenth Amendment protects a criminal defendant from conviction except on proof beyond a reasonable doubt of every element of the crime. *In re Winship*, 397 U.S. 358, 90 S.Ct. 1068, 25 L.Ed.2d 368 (1970). Even after *Winship* was decided, many federal courts still assumed that the no-evidence test of *Thompson v. Louisville*, 362 U.S. 199, 80 S.Ct. 624, 4 L.Ed.2d 654 (1960), applied to appellate review of the sufficiency of the evidence, so that as long as the jury was properly instructed on the reasonable-doubt standard, the evidence was sufficient if there was "any" or "some" evidence to support the verdict. *See Jackson v. Virginia*, 99 S.Ct. at 2787. Texas also followed an "any evidence" test at the time. *E.g., Banks v. State*, 510 S.W.2d 592, 595 (Tex. Crim. App. 1974). However, in *Jackson v. Virginia*, the Supreme Court rejected the *Thompson* doctrine as inadequate to protect against misapplication of the reasonable-doubt standard. Instead, the

focus of appellate review is on whether the record could reasonably (i.e., rationally) support a finding of guilt beyond a reasonable doubt. *Jackson v. Virginia*, 99 S.Ct. at 2788-89. The relevant question is not whether the reviewing court believes the evidence established guilt beyond a reasonable doubt, but

> . . . whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

*Jackson v. Virginia*, 99 S.Ct. at 789 (emphasis in original).

Although *Jackson v. Virginia* technically concerned only federal habeas review of a state conviction, its test for reviewing evidentiary sufficiency is the minimally acceptable test that courts may use consistent with the Due Process Clause. 99 S.Ct. at 2789 n.12; *see Carlsen v. State*, 654 S.W.2d 444, 449 (Tex. Crim. App. 1983). Texas quickly fell in line, since its sufficiency review had been less stringent. *See generally Butler v. State*, 769 S.W.2d 234, 237-39 (Tex. Crim. App. 1989)(also see Judge Clinton's concurring opinion, which was expressly adopted by the majority. 769 S.W.2d at 238 n.1, 242-43).

## II. STATE BACKGROUND – THE LAW OF CIRCUMSTANTIAL EVIDENCE

For many years, Texas treated direct and circumstantial evidence differently, requiring specific instructions concerning the jury's use of circumstantial evidence and evaluating circumstantial evidence less favorably during a sufficiency review. Most germane to this case, Texas

maintained that circumstantial evidence could not support a conviction unless that evidence excluded every reasonable hypothesis except guilt. *E.g., Flores v. State,* 551 S.W.2d 364 (Tex. Crim. App. 1977).

However, Texas began a retreat from these positions in *Hankins v. State,* 646 S.W.2d 191 (Tex. Crim. App. 1983). The Court rejected the need for a separate jury instruction concerning circumstantial evidence, reasoning that since circumstantial evidence was not inherently less trustworthy than direct evidence and since there was only a single standard of proof in a criminal case (proof beyond a reasonable doubt), an instruction on circumstantial evidence was valueless and invites confusion." 646 S.W.2d at 198-99.

Since there was no intrinsic difference in the value of direct and circumstantial evidence, the Court later concluded the same appellate test for sufficiency applied to both categories of evidence, and the appropriate test was that set out in *Jackson v. Virginia. E.g., Carlsen v. State,* 654 S.W.2d at 448-49; *Freeman v. State,* 654 S.W.2d 450 (Tex. Crim. App. 1983); *Denby v. State,* 654 S.W.2d 457 (Tex. Crim. App. 1983); *Houston v. State,* 663 S.W.2d 455 (Tex. Crim. App. 1984). In accord with its view that a single test for sufficiency existed, the Court rejected prior cases indicating that the sufficiency of circumstantial evidence was to be reviewed "in light of the presumption of innocence" and that a failure to call certain witnesses automatically rendered the evidence insufficient in so-called "weak circumstantial evidence" cases. See *Houston v. State,* 663 S.W.2d at 456, and *Chambers v. State,* 711 S.W.2d 240, 244-45 (Tex. Crim. App. 1986), respectively.

However, although the Court acknowledged that *Jackson v. Virginia* contained the "ultimate" standard for judging the sufficiency of the evidence, it held that the prior rule – whether the incriminating circumstantial evidence excluded every reasonable hypothesis except guilt – was a useful analytical guideline or construct for applying the *Jackson* test. *E.g., Carlsen v. State*, 654 S.W.2d at 449-50; *Jackson v. State*, 672 S.W.2d 801, 803 (Tex. Crim. App. 1984); *Butler v. State*, 769 S.W.2d at 238 n.1. This was appropriate because, according to the Court, " . . . if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449, and dissenting opinion by Judge McCormick, 654 S.W.2d at 450. Or, as stated in *Chambers v. State*, 711 S.W.2d at 245, it was appropriate because " . . . that is the same mental process that a rational trier of fact would employ in logically analyzing any circumstantial evidence case, weak or strong."

## III. AN OVERVIEW OF THE PROBLEMS WITH THE REASONABLE-HYPOTHESIS CONSTRUCT

If we could collect all criminal cases, muster the best proof that the prosecution could offer in support of its charges, submit that proof to multiple juries, tell those juries they should assume that all of that evidence is truthful, and further advise them that they should give the evidence the greatest weight that logic and their understanding of human experience allow, common sense tells us the cases would fall into three broad categories:

(1) those in which the State's evidence was so overwhelming that *all* juries, acting rationally, would vote to convict under a reasonable doubt standard;

(2) those in which the State's evidence was so weak that *no* rational jury would vote to convict; and

(3) those in which the State's evidence fell somewhere in between – strong enough to convince some rational juries that the defendant was guilty beyond a reasonable doubt but not strong enough to convince all of them. Cases in category three would run the gamut from those in which almost all of the hypothetical juries convicted to those in which very few did.

Category three exists because of the diversity of human experience. We can posit situations in which all can agree on the relevant facts from which a conclusion must be drawn, and the rules of logic apply with equal force to us all. However, the conclusions which one may rationally draw depend on the weight given the facts. The weight we assign them is not a matter of logic, but experience, and turns on such factors as our values and our views of how the world works and what motivates people in certain situations. For these reasons, rational people can rationally disagree about the meaning of a given set of facts. This is true whatever the standard of proof required for a conclusion because of the varying weight given the facts by each individual's experience. A fact which is significant enough to satisfy one person of something beyond a reasonable doubt might, if considered by another with different life experiences, be insufficient to satisfy him even under a standard which requires only that the conclusion be more likely than not correct.

Only in the theoretical world of formal logic are absolute conclusions possible. Any legal rule predicated on the need for such certainty, such absolute agreement, will be doomed because the legal doctrine is at odds with the realities of the human condition.

To return to our three categories of proof, any legal system seeking to devise a rule specifying what quantum of proof would be sufficient to justify a criminal conviction would uphold convictions in category one and overturn those in category two. Those are the results reached by both *Jackson v. Virginia* and reasonable-hypothesis theory. The only significant debate concerns what to do with those cases falling in the middle – those in category three.

*Jackson v. Virginia* places a constitutional blessing on category three cases. This is a necessary consequence of the phrasing " . . . whether *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." The reasonable-hypothesis-of-innocence construct, however, necessarily excludes category three cases from those which may be upheld. The construct would uphold the conviction only in category one cases because only in that group is there *no* reasonable hypothesis of innocence. The construct, in other words, will sustain a conviction only if *every* rational trier of fact would have convicted.[2]

Thus, despite the Court's statements to the contrary in *Butler v. State*, *Carlsen v. State*, and many other cases,

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[2] For example, in *Chambers v. State*, 711 S.W.2d at 248, the Court upheld the sufficiency of the evidence because "reasonable minds can draw only one inference."

the *Jackson* test and the reasonable-hypothesis construct are not harmonious phrasings of the same rule. They are in sharp conflict. The construct holds the State to a higher burden than is constitutionally required and thus will cause the reversal of some cases – the category three cases – that would be eminently affirmable under *Jackson v. Virginia*.[3] *Carlsen, Butler,* and their progeny must be overruled to the extent of this conflict.

Moreover, there is no defensible basis for retaining reasonable-hypothesis analysis as a matter of state law. That analysis usurps the constitutional role of the jury as trier of fact. Under our system, juries are entrusted with the responsibility of deciding whether proof beyond a reasonable doubt exists. If an appellate court may reverse a conviction because *the court* discerns a reasonable hypothesis of innocence, even though by definition the evidence may also support a reasonable hypothesis of guilt, then the court inevitably takes on the role of a 13th and deciding juror. The only proper question for a reviewing court is whether *the jury could have* rationally convicted.

Before examining in more detail the origin and meaning of the Texas construct, we turn first to a fuller examination of *Jackson v. Virginia*. This will emphasize that the

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[3] Since both rules sustain the jury's guilty verdict in category one cases, those in which every rational jury would convict, the construct may be used to affirm a conviction without running afoul of *Jackson*. However, there appears to be no utility in invoking the construct there since it should always be easier to proceed directly to the basic and less stringent test, asking simply whether *any* rational trier of fact could have convicted.

State has not misinterpreted *Jackson* itself, give a fuller understanding of the Supreme Court's reasoning in *Jackson*, and provide a background for the argument that reasonable-hypothesis analysis is equally indefensible as an appellate test under state law.

## IV. *JACKSON V. VIRGINIA* REJECTS REASONABLE-HYPOTHESIS ANALYSIS

### A. THE OBVIOUS TEXTUAL CONFLICT

As the State has already discussed, reasonable-hypothesis analysis asks whether any rational jury could have acquitted, whereas the test of *Jackson v. Virginia* asks whether any rational jury could have convicted. The State is not the only entity to find these approaches inconsistent, based simply on a textual comparison of the tests. The Sixth Circuit addressed the question in *York v. Tate*, 858 F.2d 322 (6th Cir. 1988), *cert. denied*, 109 S.Ct. 1960 (1989). There, the federal district court applied reasonable-hypothesis analysis because the Ohio state courts used it. The Ohio doctrine was known as "the *Kulig* rule," referring to *State v. Kulig*, 37 Ohio St.2d 157, 309 N.E.2d 897 (1974). The Sixth Circuit rejected that approach, saying:

> . . . . By applying the *Kulig* rule, the district court turned the *Jackson* standard on its head. Rather than asking whether *any* reasonable juror could have found petitioner guilty, the district court considered whether any reasonable juror could have found the petitioner *not* guilty. . . . Such an analysis is totally at odds with the standard of review set forth by the Supreme Court in *Jackson*. . . .

*York v. Tate*, 858 F.2d at 330. *Accord*: *Laird v. Lack*, 884 F.2d 912, 914-15 (6th Cir. 1989).[4]

### B. *JACKSON V. VIRGINIA*, BY THE REAFFIRMATION OF *HOLLAND V. UNITED STATES*, REJECTS REASONABLE-HYPOTHESIS ANALYSIS AS PART OF THE CONSTITUTIONAL TEST

In *Holland v. United States*, 348 U.S. 121, 140, 75 S.Ct. 127, 137-38, 99 L.Ed. 150 (1954), the Supreme Court rejected the notion that a federal criminal jury had to be instructed that a conviction could be returned on circumstantial evidence only if that evidence excluded every reasonable hypothesis other than guilt:

> Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. In both instances, a jury is asked to weigh the chances that the evidence correctly points to guilt against

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[4] Various state courts have similarly concluded that reasonable-hypothesis analysis is inconsistent with *Jackson v. Virginia*. *State v. Randles*, 115 Idaho 611, 768 P.2d 1344, 1346-47 (App. 1989), *aff'd*, 787 P.2d 1152, 1158 (Idaho 1990); *Hines v. State*, 58 Md.App. 637, 473 A.2d 1335, 1347-49 (Md. Ct. Spec. App. 1984); *State v. Buchanan*, 312 N.W.2d 684, 689 (Neb. 1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38; *State v. Derouchie*, 140 Vt. 437, 440 A.2d 146, 148-50 (1981); *Poellinger v. State*, 153 Wis.2d 493, 451 N.W.2d 752, 757 (1990).

> the possibility of inaccuracy or ambiguous inference. In both, the jury must use its experience with people and events in weighing the probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more.

*Holland v. United States*, 75 S.Ct. at 137-38.

Although the *Holland* Court assumed the jury needed to be properly instructed on reasonable doubt for this rule to apply, it did not seem to envision that any particular explanation of reasonable doubt was required since it remarked shortly thereafter that attempts to explain "reasonable doubt" do not usually make the concept clearer. 75 S.Ct. at 137-38. In other words, "proper instruction" likely meant only that the jury must be instructed that proof beyond a reasonable doubt is the standard of proof.

The Supreme Court had the opportunity to revisit *Holland* as it applied its new constitutional test in *Jackson v. Virginia*. In rejecting one of the defendant's arguments that he was entitled to an acquittal, the Court also rejected reasonable-hypothesis analysis:

> Only under a theory that the prosecution was under an affirmative duty to rule out every hypothesis except that of guilt beyond a reasonable doubt could this petitioner's challenge be sustained. **That theory the Court has rejected in the past.** *Holland v. United States*, [citation omitted]. **We decline to adopt it today.** Under the standard established in this opinion . . . , a federal habeas corpus court faced with a record of historical facts that supports conflicting inferences must presume – even if it does not affirmatively appear in the record – that the trier of fact resolved any such conflicts in favor of the prosecution, and we must defer to that resolution.

*Jackson v. Virginia*, 99 S.Ct. at 2792-93 (emphasis added).

In light of the underscored language, the State cannot agree with this Court's suggestion that the Supreme Court rejected reasonable-hypothesis analysis only "for its own reasons of practice." *Butler v. State*, 769 S.W.2d at 243 (concurring opinion, adopted by majority). Even if it might be argued that *Holland's* foundation was federal common law or the Supreme Court's supervisory powers, the rejection of reasonable-hypothesis analysis was unquestionably grounded on constitutional doctrine in *Jackson v. Virginia*.

### C. THE TEST OF JACKSON V. VIRGINIA IS DRAWN FROM THE SUPREME COURT'S EARLIER DECISION IN JOHNSON V. LOUISIANA, WHICH REJECTS THE IDEA THAT A SET OF FACTS IS RATIONALLY SUSCEPTIBLE OF ONLY ONE INTERPRETATION BEYOND A REASONABLE DOUBT

The "overview" section of the argument explains how reasonable-hypothesis analysis will affirm a conviction only if *every* trier of fact would rationally convict. That view presupposes that proof beyond a reasonable doubt is an all-or-nothing proposition; if even one rational person, acting rationally, says he has a reasonable doubt about a matter, then it cannot be said that the matter has been satisfactorily established. That view of reasonable doubt was rejected under the federal constitution in *Johnson v. Louisiana*, 406 U.S. 356, 92 S.Ct. 1620, 32 L.Ed.2d 152 (1972), and again in *Jackson v. Virginia*.

Let us again examine the text of *Jackson v. Virginia:*

> . . . the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. See *Johnson v. Louisiana*, 406 U.S., at 362, 92 S.Ct., at 1624-1625.

*Jackson v. Virginia*, 99 S.Ct. at 2789. The referenced passages in *Johnson v. Louisiana* illuminate the *Jackson* test and make clear why "any" is underscored.

*Johnson v. Louisiana* upholds a Louisiana statute allowing a jury to convict an accused of certain felonies if at least nine of twelve jurors conclude the proof establishes guilt beyond a reasonable doubt. The defendant argued under the Due Process Clause that if three of twelve jurors voted to acquit, then necessarily his guilt had not been constitutionally proven beyond a reasonable doubt. In rejecting that argument, the Court said:

> Of course, the State's proof could perhaps be regarded as more certain if it had convinced all 12 jurors instead of only nine. It would have been even more compelling if it had been required to convince and had, in fact, convinced 24 or 36 jurors. But the fact remains that nine jurors – a substantial majority of the jury – were convinced by the evidence. In our view disagreement of three jurors does not alone establish reasonable doubt, particularly when such a heavy majority of the jury, after having considered the dissenters' views, remains convinced of guilt. **That rational men disagree is not in itself equivalent to a failure of proof by the State, nor does it indicate infidelity to the reasonable-doubt standard. Jury verdicts finding guilty beyond a reasonable doubt are regularly sustained even though the evidence was such**

> **that the jury would have been justified in having a reasonable doubt, [citations omitted]; even though the trial judge might not have reached the same conclusion as the jury, [citation omitted]; and even though appellate judges are closely divided on the issue whether there was sufficient evidence to support a conviction. [citations omitted]. . . .**

*Johnson v. Louisiana*, 406 U.S. at 362-63, 92 S.Ct. at 1625 (emphasis added). The Court went on to note that if the disagreement of any of the jurors meant that proof beyond a reasonable doubt was lacking, then a hung jury presumably would require a directed verdict of acquittal rather than a mistrial. *Id.*

From this excerpt, we can conclude a number of things about the constitutional meaning of proof beyond a reasonable doubt. First, the Constitution does not require that everyone agree on a matter for something to be proven beyond a reasonable doubt. Rational people, acting rationally, may disagree about the significance of the same set of facts, and such disagreement does not necessarily undermine the presence of proof beyond a reasonable doubt. In a world of fallible human beings with different values and experiences, there is no such thing as absolute proof beyond a reasonable doubt. (Rational people could, of course, make logical or factual errors in a particular case, but we assume throughout that everyone is rational in their analysis.) All that matters under the Due Process Clause is that the jurors be properly instructed on the constitutional standard, that such proof beyond a reasonable doubt be established in the minds of the requisite number of jurors which local law requires for a verdict, and that there be a rational basis in

the evidence for their conclusion. "[W]e can require no more." *Holland v. United States*, 75 S.Ct. at 138. Second, if the presence of a reasonable doubt in the minds of three of twelve jurors does not constitute reasonable doubt in the constitutional sense, then *a fortiori* the evidence is not insufficient merely because others not on the jury (such as judges reviewing the sufficiency of the evidence) have a reasonable doubt or discern a reasonable hypothesis of innocence.

In light of the Supreme Court's definition of proof beyond a reasonable doubt in *Holland v. United States* and *Johnson v. Louisiana* and its explicit rejection of reasonable-hypothesis analysis in *Jackson v. Virginia*, this Court's statements that reasonable-hypothesis analysis is consistent with *Jackson* are simply untenable.

## V. OTHER JURISDICTIONS REJECT REASONABLE-HYPOTHESIS ANALYSIS AS AN APPELLATE TEST FOR EVIDENTIARY SUFFICIENCY

Texas admittedly could choose to adopt reasonable-hypothesis analysis as a matter of state law. The impressive number of states rejecting that approach weighs against that option.

The Supreme Court of Washington recently wrote on the question:

> . . . We believe that this issue is before us today because of confusion concerning the oft-stated rule that circumstantial evidence must be strong enough to exclude every reasonable hypothesis of innocence. . . .
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> . . . .

In circumstantial evidence cases, this court has often failed to maintain the appropriate distinction between the applicability of the hypothesis of innocence rule at the trial court level and the applicability of the reasonable doubt standard of review on appeal. We have recognized that the elimination of hypotheses of innocence is the process by which the trier of fact reaches a determination of guilt beyond a reasonable doubt, and we have mistakenly stated that a conviction based on circumstantial evidence may be sustained on appeal or review if the evidence is sufficiently strong to exclude every reasonable theory of innocence. . . .

. . . . The defendant maintains that this court must reverse her conviction for possession of cocaine because the circumstantial evidence in support of that conviction supports an equally reasonable theory that she did not know that she possessed cocaine. We disagree.

The defendant is, in essence, asking this court to sit as a judge or jury making findings of fact and to apply the hypothesis of innocence rule *de novo* to the evidence presented at her trial to determine if, in our view, the hypothesis that she did not know that she possessed cocaine is sufficiently reasonable to warrant reversal of her conviction. It is not the role of an appellate court to do that. . . .

When an appellate court independently reviews the evidence presented at trial to determine whether, in its view, there are reasonable theories consistent with the defendant's innocence, it replaces the trier of fact's overall evaluation of the evidence with its own. A theory of innocence which appears to be reasonable to an appellate court on review of the record may have been rejected as unreasonable by the trier of fact in view of the evidence and testimony

presented at trial. It is the function of the trier of fact, and not of an appellate court, fairly to resolve conflicts in the testimony, to weigh the evidence, and to draw reasonable inferences from basic facts to ultimate facts. See Jackson v. Virginia [full citation omitted].

In viewing evidence which could support contrary inferences, the trier of fact is free to choose among conflicting inferences of the evidence and may, *within the bounds of reason*, reject that inference which is consistent with the innocence of the accused. [citation omitted] Thus, when faced with a record of historical fact which supports more than one inference, an appellate court must accept and follow the inference drawn by the trier of fact unless the evidence on which that inference is based is incredible as a matter of law. See Jackson v. Virginia [citations omitted].

Accordingly, we hold that, in reviewing the sufficiency of the evidence to support a conviction, an appellate court may not substitute its judgment for that of the trier of fact unless the evidence, viewed most favorably to the state and the conviction, is so lacking in probative value and force that no trier of fact, acting reasonably, could have found guilt beyond a reasonable doubt. [citation omitted] If any possibility exists that the trier of fact could have drawn the appropriate inferences from the evidence adduced at trial to find the requisite guilt, an appellate court may not overturn a verdict even if it believes that the trier of fact should not have found guilt based on the evidence before it. . . .

. . . . In reviewing the sufficiency of circumstantial evidence to support a conviction, an appellate court need not concern itself in any way with evidence which might support other

> theories of the crime. An appellate court need only decide whether the theory of guilt accepted by the trier of fact is supported by sufficient evidence to sustain the verdict rendered.

*Poellinger v. State*, 451 N.W.2d at 756-58 (emphasis in original).

The Supreme Court of California, sitting en banc, discussed the same issue:

> . . . . Although it is the duty of the jury to acquit a defendant if it finds that circumstantial evidence is susceptible of two interpretations, one of which suggests guilt and the other innocence [citation omitted], it is the jury, not the appellate court which must be convinced of the defendant's guilt beyond a reasonable doubt. " 'If the circumstances reasonably justify the trier of fact's findings, the opinion of the reviewing court that the circumstances might also be reasonably reconciled with a contrary finding does not warrant a reversal of the judgment [citation omitted]' "

*People v. Bean*, 46 Ca1.3d 919, 251 Cal. Rptr. 467, 760 P.2d 996, 1003 (1988).

Just months ago, Idaho also rejected reasonable-hypothesis analysis. The intermediate appellate court stated:

> The argument is conceptually flawed. The "reasonable hypothesis" rule is an elaboration of the state's burden of proof at trial; it is not a standard for appellate review of jury verdicts. . . . the "reasonable hypothesis" rule does not empower an appellate court to second-guess the inferences reasonably drawn from circumstantial evidence by a properly instructed jury.

*State v. Randles*, 115 Idaho 611, 768 P.2d 1344, 1346-47 (Ct.App. 1989). The Idaho Supreme Court affirmed on appeal:

> The function of an appellate court with regards to the facts of a case is to determine whether there was substantial and competent evidence supporting the verdict. [citation omitted] To require the court at the appellate level to evaluate whether the evidence suggests any reasonable hypothesis of innocence of a defendant already convicted by a jury would be an impermissible usurpation of the role of the trier of fact.

*State v. Randles*, 787 P.2d 1152, 1158 (Idaho 1990).

To quote from additional cases would unduly lengthen the brief. However, many other states have also repudiated the reasonable-hypothesis test as an appellate tool. *Des Jardins v. State*, 551 P.2d 181, 184-85 (Alaska 1976); *State v. Nash*, 694 P.2d 222, 234 (Ariz. 1985); *Ciccaglione v. State*, 474 A.2d 126 (Del. 1984); *Ford v. United States*, 498 A.2d 1135 (D.C. Ct. App. 1985); *Youngblood v. State*, 179 Ga. App. 163, 345 S.E.2d 634 (1986); *People v. Eyler*, 133 Ill.3d 173, 549 N.E.2d 268, 276 (1989); *Kidd v. State*, 530 N.E.2d 287 (Ind. 1988); *State v. Radeke*, 444 N.W.2d 476, 479 (Iowa 1989); *State v. Morton*, 230 Kan. 525, 638 P.2d 928 (1982); *Hines v. State*, 58 Md. App. 637, 473 A.2d 1335, 1347-49 (1984); *People v. Johnson*, 137 Mich.App. 295, 357 N.W.2d 675 (1984); *Stokes v. State*, 518 So.2d 1224 (Miss. 1988); *State v. Buchanan*, 312 N.W.2d 684, 689 (Neb. 1981); *State v. Sutphin*, 107 N.M. 126, 753 P.2d 1314, 1318 (1988); *State v. Jones*, 303 N.C. 500, 279 S.E.2d 835, 837-38 (1981); *State v. Jacobson*, 419 N.W.2d 899, 901 (N.D. 1988); *Commonwealth v. Sullivan*, 472 Pa.

129, 371 A.2d 468, 478 (1977); *State v. Caruolo*, 524 A.2d 575, 581 (R.I. 1987); *State v. Neale*, 145 Vt. 423, 491 A.2d 1025, 1031-32 (1985); *State v. Couch*, 44 Wash. App. 26, 720 P.2d 1387, 1389 (1986).[5]

Similarly, the lower federal courts unanimously abandoned the reasonable-hypothesis test as a mechanism for appellate review of federal convictions. The Fifth Circuit, recognizing that it was the last to fall into line, stated:

> . . . It is not necessary that the evidence exclude every reasonable hypothesis of innocence or be wholly inconsistent with every conclusion except that of guilt, provided a reasonable trier of fact could find that the evidence establishes guilt beyond a reasonable doubt. [footnote 3, omitted, cites decision from all other circuits] A jury is free to choose among reasonable constructions of the evidence.

*United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982), *aff'd*, 462 U.S. 356, 103 S.Ct. 2398, 76 L.Ed.2d 638 (1983).

An especially cogent critique (both practical and philosophical) of reasonable-hypothesis analysis appears in *United States v. Nelson*, 419 F.2d 1237 (9th Cir. 1969):

> The "reasonable hypothesis" test was formulated for the evaluation of circumstantial evidence. . . . the Supreme Court rejected the test in *Holland* on the premise that there is no essential difference in the mental processes required of the jury in weighing direct and circumstantial

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[5] Robert Huttash and Carl Dally of the State's Attorney's Office have generously shared their ideas and research on the issues discussed in this brief. A number of decisions cited in this brief were unearthed by Mr. Huttash and Mr. Dally.

evidence. [footnote omitted] As to both, "the jury must use its experience with people and events in weighing probabilities. If the jury is convinced beyond a reasonable doubt, we can require no more." Holland, 348 U.S. at 140, 75 S.Ct. at 138.

The key word is "probabilities." The jury cannot determine that a proposition is true or false, but only that it is more or less probable. Guilt "is proved beyond a reasonable doubt if it proved not only to be more probable than its contradictory but much more probable than its contradictory." Adler & Michael, The Trial of an Issue of Fact I, 34 Colum. L. Rev. 1224, 1256 (1934). The required degree of probability is reached if the jury is free of "the kind of doubt that would make a person hesitate to act" in the more serious and important affairs of his own life. Holland v. United States, *supra*, 348 U.S. at 140, 75 S.Ct. at 138.

It adds only an illusion of certainty, and is both misleading and wrong, to attempt to describe this broad exercise of practical judgment in abstract generalizations borrowed from the terminology of formal logic.

The "reasonable hypothesis" test does not reflect what juries and reviewing courts in reality do. Juries constantly convict, and the convictions are duly affirmed, on evidence upon which none would hesitate to act but which cannot be said to exclude as a matter of inexorable logic, every reasonable hypothetical consistent with innocence. [footnote omitted]

Moreover, the impression left by appellate court opinions is that the "reasonable hypothesis" standard may lead to serious departures from the proper appellate role in evaluating the sufficiency of evidence. Courts following the rule exhibit a noticeable tendency to divide the

> evidence into separate lines of proof, and analyze and test each line of proof independently of others rather than considering the evidence as an interrelated whole.[6] The sufficiency of the evidence is often tested against theoretical and speculative possibilities not fairly raised by the record, and inferences are sometimes considered which, though entirely possible or even probable, are drawn from evidence which the jury may have disbelieved.

*United States v. Nelson*, 419 F.2d at 1244-45.

This is an impressive array of authority against the reasonable-hypothesis test. The Court should not lightly ignore it:

> The fact that other jurisdictions and textbook writers have criticized a rule we have embraced does not, standing alone, furnish a reason for abandonment of such rule. However, if precedent does not have some sort of reasonable underpinning, we should not bury our heads in the sand when such criticism is voiced.

*Chambers v. State*, 711 S.W.2d at 247; *Ballew v. State*, 640 S.W.2d 237, 244 (Tex. Crim. App. 1982).

## VI. A REPRISE OF REASONABLE-HYPOTHESIS ANALYSIS IN TEXAS LAW

After *Jackson v. Virginia* was decided, this Court suggested that reasonable-hypothesis analysis was appropriate for two related reasons:

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[6] Regarding this particular problem, see the Court's recent opinion in *Villalon v. State*, #1297-87 (Tex. Crim. App.; June 6, 1990) (not yet published).

(1) " . . . if the evidence supports an inference other than the guilt of the appellant, a finding of guilt beyond a reasonable doubt is not a rational finding." *Carlsen v. State*, 654 S.W.2d at 449, and dissenting opinion by Judge McCormick, 654 S.W.2d at 450;

(2) reasonable-hypothesis analysis is the "same mental process that a rational trier of fact would employ in logically analyzing any circumstantial evidence case, weak or strong." *Chambers v. State*, 711 S.W.2d at 245.

The State's argument here is to an extent a recapitulation of points made earlier. However, as the State is also faced with the task of convincing the Court not to adopt reasonable-hypothesis analysis as a state-law concept, the arguments bear repeating. This is especially so given the strong surface appeal of the idea that guilt logically cannot have been proven beyond a reasonable doubt if the evidence also supports an inference of innocence.

That idea is presumably a correct one in the abstract world of the academic logician. In that environment, the rules of logic are clearly set out, each relevant fact can be properly specified, and, most important, the weight to be accorded each fact may also be identified. Once that is done, a rigorous application of logic to known facts having known weights should lead to a single correct conclusion.

In the world in which we actually live, there is always a variable. Although the rules of logic stay the same and although we can isolate the facts by "viewing the evidence in the light most favorable to the verdict," there is no single "correct" weight to be given those facts. As we have argued before, the weight accorded a fact is a

function of one's experience. The range of weights that may appropriately be ascribed to the facts is as broad as the range of normal human experience, and consequently a range of "reasonable" conclusions will result. This is why in the real world, on the same facts, proof of guilt beyond a reasonable doubt may exist alongside a reasonable hypothesis of innocence.[7] *See United States v. Nelson*, 419 F.2d at 1245 ("It adds only an illusion of certainty, and is both misleading and wrong, to attempt to describe this broad exercise of practical judgment [referring to jury's deliberations on guilt] in abstract generalizations borrowed from the terminology of formal logic."). Proof beyond a reasonable doubt does not require mathematical certainty. *Holland v. United States*, 75 S.Ct. at 137.

As to the second justification for reasonable-hypothesis analysis (that it is merely using the same methodology the jury would use), the State emphasizes what other jurisdictions have noted: the *only* appropriate use of reasonable-hypothesis analysis is as a general description of how *an individual jury* should approach its task. Even there, no mathematical certainty can or should be required of the deliberative process. *Holland v. United States*, supra. When that analysis is transported to the *appellate* realm, the appellate judges necessarily become the 13th juror. If the appellate court, in the face of a reasonable hypothesis of guilt, must order an acquittal

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[7] In this respect, the universally accepted requirement that the evidence be viewed in the light most favorable to the verdict means that a reviewing court must presume that the trier of fact not only resolved all factual disputes in the State's favor but also accorded the incriminating evidence the greatest weight to which it reasonably could have been entitled.

because there is also a reasonable hypothesis of innocence, the rational verdict of a jury is subject to revision simply because the judges would have decided the case differently. That surely should not be the law.

The State is well aware that the use of reasonable-hypothesis analysis has a long history in Texas. At least as early as 1863 a conviction was reversed under reasonable-hypothesis theory. See *Elizabeth v. State*, 27 Tex. 329 (1863) (no citation of authority). Significantly, the early decisions indicate that the analysis was based on nothing more than common law. *See Hampton v. State*, 1 Tex. Ct. App. 652 (1877); *Pogue v. State*, 12 Tex. Ct. App. 283 (1882), which cite treatises and decisions from other jurisdictions. Thus, the doctrine seems purely court-made and subject to immediate revision if warranted by more enlightened thought. As preceding sections demonstrate, there is a marked trend away from resort to reasonable-hypothesis analysis. *Hankins v. State*, 646 S.W.2d at 198-99. Moreover, the language used in the early cases to describe the reasonable-hypothesis rule (such as satisfaction to a "moral certainty" and appellate review "in light of the presumption of innocence") is identical to that repudiated by this Court. *See Houston v. State*, 663 S.W.2d at 456; *Carlsen v. State*, 654 S.W.2d at 449-50. A more recent and respected treatise, *Wigmore on Evidence*, was one of the authorities cited when the Court rejected the necessity of a jury instruction on circumstantial evidence.

In addition, the Court should abandon reasonable-hypothesis analysis because that theory is at odds with every remaining decision of the Court on related topics. *Hankins v. State* did away with the need for a circumstantial evidence charge because it was useless and confusing

once the Court acknowledged there was no intrinsic difference in the quality of direct and circumstantial evidence. *Chambers v. State* rejected the special rule for "weak" circumstantial cases. There is no right to voir dire the jury panel regarding the old circumstantial evidence charge. *Spence v. State*, # 69,341 (Tex. Crim. App.; June 13, 1990) (not yet published). Why should this one aspect of circumstantial evidence law, the reasonable-hypothesis analysis, survive? If reasonable-hypothesis analysis is appropriate, would it not be logical for the State to avoid application of the construct by seeking to invoke the old "close juxtaposition" rule in which strong but technically circumstantial evidence was "deemed" direct evidence? See *Frazier v. State*, 576 S.W.2d 617 (Tex. Crim. App. 1978). Could the State not similarly fend off use of the construct in cases where only the culpable mental state was proven circumstantially by analogizing to prior decisions holding that a charge on circumstantial evidence was not required in such situations?[8] See *Schwartz v. State*, 357 S.W.2d 393 (Tex. Crim. App. 1962). Indeed, if the construct makes any sense at all, would it not have to be equally applicable to both direct and circumstantial evidence cases? Although *Carlsen v. State* alludes to this possibility, 654 S.W.2d at 450, the State is aware of no case in which the Court has applied reasonable-hypothesis analysis to a direct evidence case. Finally, if reasonable-hypothesis analysis is taken to its logical conclusion, a conviction could not be upheld unless the appellate judges were

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[8] See the argument advanced by the State's Attorney's Office in *Miguel Angel Garcia v. State*, #04-88-422-CR (Tex. App. – San Antonio, Mar. 30, 1990).

themselves unanimous. That of course has never been the law, but if the appellate judges accord themselves the right to reasonably disagree, why should jury verdicts be treated with less deference? *See Beardsley v. State*, 738 S.W.2d 681, 685-86 (Tex. Crim. App. 1987) (Judge Duncan concurring and dissenting) (Court of Criminal Appeals should normally not review sufficiency decisions of the courts of appeals even if lower court was wrong). *See also Carter v. State*, #979-90 (Tex. Crim. App.; June 20, 1990) (not yet published) (Judge Clinton concurring in refusal of appellant's petition for review) ("we are satisfied that a rational appellate court *could* determine and declare [that "Rose" error was harmless beyond a reasonable doubt]") (emphasis added). Consistency alone counsels against retention of the reasonable-hypothesis construct.

Another point to keep in mind is that when reasonable hypothesis analysis had its origins, the consequence of a reversal for insufficient evidence was merely a remand for a new trial. Only in the late 1970s did such a reversal mean that a judgment of acquittal was entered. See *Burks v. United States*, 437 U.S. 1, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978); *Greene v. Massey*, 437 U.S. 19, 98 S.Ct. 2151, 57 L.Ed.2d 15 (1978). Prudence dictates that rules be re-examined when their consequences change. See *Lehman v. State*, #383-87 (Tex. Crim. App.; June 20, 1990) (not yet published) (footnote 1).

Finally, the reasonable-hypothesis construct is inconsistent with the Court's approach to sufficiency of the evidence in *Blankenship v. State*, 780 S.W.2d 198 (Tex. Crim. App. 1989). Indeed, *Blankenship* could be read to implicitly overrule the reasonable-hypothesis aspect of *Carlsen* and *Butler*. *Blankenship* addressed the sufficiency

of the evidence to establish that a certain structure was a habitation. If we are not reading too much into the various opinions in that case, the Court seemed to divide into one camp (the majority on original submission) which believed that on a given set of facts there could be only a single rational resolution of the structure's status, while the other camp (the majority on rehearing) believed not only that there could be divergent but equally rational resolutions but also that the reviewing court must defer to the jury's decision if it is a reasonable one. On rehearing, the majority stressed that any other approach placed the Court in the position of 13th juror. The argument which the State advances here is in accord with *Blankenship*.[9]

For all of the reasons discussed, the Court should abandon the reasonable-hypothesis-of-innocence analysis. That theory is squarely at odds with *Jackson v. Virginia* and the trend of decisions in other jurisdictions. Most important, that theory necessarily makes the appellate court a 13th juror with the power to overturn the

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[9] There are other indications that the Court is retreating from *Carlsen* and *Butler*. In *Herndon v. State*, 787 S.W.2d 408, 409 (Tex. Crim. App. 1990), the Court said, "we need not concern ourselves with whether there is a 'reasonable hypothesis' extant in this cause because . . . " the evidence was insufficient even viewing the evidence in the light most favorable to the verdict (citing *Jackson v. Virginia* and *Butler v. State*). Although ambiguous, this statement could mean the Court believes the evidence in that case came within our "category two" in which no rational trier of fact could convict, but recognizes that in other circumstances the evidence could fall within "category three" in which some but not all rational triers of fact would convict.

verdict of the trial jury even though its verdict was rationally supported by the evidence. Such a usurpation of the jury's function cannot be allowed to continue.

## VII. APPLICATION OF THE *JACKSON* TEST TO THE FACTS OF THIS CASE

Viewed in the light most favorable to the verdict, the evidence establishes that:

> 1) A stolen pickup was driven on to the premises of a closed Texaco station. R. V – 17, 21, 35.
>
> 2) Two people were in the pickup; one wore light-colored clothing and the other wore dark-colored clothing. R. V – 37, 54.
>
> 3) The driver was the one in light-colored clothes – specifically, a white T-shirt and cream-colored pants. R. V – 54.
>
> 4) Appellant, the only person found at the scene, wore a white T-shirt, long cream-colored pants, and white tennis shoes. R. V – 53-54.
>
> 5) Appellant was carrying stolen cans of oil; similar cans were in the bed of the pickup. R. V – 50-51, 57.
>
> 6) Three packages of cigarettes on the left side of the pickup's dashboard above the steering wheel bore Appellant's fingerprints. R. V – 94-96.
>
> 7) Appellant falsely stated that he had never seen the truck before. R. V – 50-51, 57, 94-96.

Under the *Jackson v. Virginia* test, the totality of this evidence, especially the driver's side cigarette packages

with Appellant's fingerprints on them and the match between Appellant's clothing and the driver's description, provides ample proof from which the jury could reasonably have concluded beyond a reasonable doubt that Appellant operated the vehicle.

The way the Court of Appeals handled the facts illustrates the pitfalls in reasonable-hypothesis analysis. First, the court segments the evidence instead of viewing its impact as a whole. *See Villalon v. State*, supra. Second, having chosen to separately analyze the impact of the fingerprint evidence and the clothing "match," the court sets itself up as the 13th juror.

With regard to the fingerprints on the cigarette packages, the court concludes such evidence provides only a strong suspicion of guilt and thus may reasonably be reconciled with innocence. Presumably the court does not dispute that smoking drivers frequently flip their cigarette packages on top of the dash for handy access. It is not clear where the court goes from there. Perhaps it thinks Appellant may have never been more than a passenger and that the cigarettes arrived in that location either because Appellant tossed them there from the passenger seat or because the real driver placed them there, perhaps after borrowing a smoke. Perhaps the court believes Appellant was the driver at some point, but not at the time of this incident (which would overlook the fact that the State could rely on the "on or about" language in the charge, R. I – 74). Perhaps the Court of Appeals saw another innocent explanation. However, those explanations are irrelevant under *Jackson v. Virginia*. The only question is whether the jury could rationally

conclude beyond a reasonable doubt that Appellant operated the vehicle, a conclusion which would be eminently reasonable even if the fingerprint evidence were all the State had.

Even more baffling is the court's treatment of the similarity between Appellant's clothing and the description which the police dispatcher received of the driver. In his brief, Appellant conceded that if the information given the dispatcher was believed, then " . . . by elimination, the Appellant must have been the driver." App's brief in Ct. App., p. 7. He then argued that since the testimony concerning the description was second- or third-hand hearsay, it could not rationally support a verdict. Appellant recognized, however, that unobjected-to hearsay was no longer automatically denied probative value. App's brief in Ct. App., pp. 15-17. Instead of pursuing this argument, the Court of Appeals simply sought to distinguish the State's reliance on *Bonner v. State*, 640 S.W.2d 601 (Tex. Crim. App. 1982), where a similarity in clothing was enough to establish identity. Judging from the Court of Appeals' emphasis that Bonner's clothing was "identical" to that described by the witness, we assume the court concluded that an identical match was required as a matter of law and that the match was not identical in Appellant's case. Yet the dispatcher said the driver's description included a white T-shirt and cream-colored pants, which matched Appellant's shirt and pants. We can only assume that the Court of Appeals was troubled by the caller's failure to tell the dispatcher that the driver was also wearing the white tennis shoes which Officer Pierce observed on Appellant's feet. R. V – 54.

In any event, the Court of Appeals again makes itself the trier of fact. The court is deciding for itself how much weight should be accorded the similarity between Appellant's clothing and the driver's description. Not only is this improper; it makes no sense. It would be plausible only if Appellant was a hidden third person in the pickup, wearing light-colored clothing, but not driving. There is, of course, no evidence to support such speculation. The lower court's attempt to distinguish *Bonner* fails.

In short, the evidence was adequate to support the verdict under a correct understanding of the *Jackson v. Virginia* test.

## CONCLUSION AND PRAYER

The Court should abandon reasonable-hypothesis analysis. That analysis presumes that proof beyond a reasonable doubt is capable of resolution with a mathematical certainty that neither the Due Process Clause nor common sense requires. That analysis also inevitably places the appellate court in the role of 13th juror.

The judgment of the Court of Appeals should be reversed and the conviction affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of this brief has been mailed to Allan Butcher, First City Bank Tower, 201 Main St., Ft. Worth, Texas 76102, and to Robert Huttash, State Prosecuting Attorney, P.O. Box 12405, Austin, TX 78711, on June 28, 1990.

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